IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 17, 2008

TIMOTHY DISMUKES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
Nos. 2003-A-632 & 2003-B-1148 Monte Watkins, Judge

No. M2008-00196-CCA-R3-PC - Filed April 15, 2009

Petitioner, Timothy Dismukes, pled guilty to aggravated assault and felon in possession of a weapon stemming from incidents on November 22, 2002. Pursuant to the plea agreement, Petitioner was sentenced to an effective sentence of six years and one month as a Range II offender. Subsequently, on March 9, 2006, Petitioner filed a Petition for post-conviction relief. After conducting an evidentiary hearing, the post-conviction court denied and dismissed the petition. On appeal to this Court, Petitioner argues that the post-conviction court erred in denying and dismissing his petition because his plea was involuntary and unknowing due to the ineffective assistance of counsel. After a thorough review of the record, we conclude that Petitioner has not shown that his counsel was ineffective in plea bargaining. Therefore, he has not proven that his plea was entered involuntarily or unknowingly. We affirm the post-conviction court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Isaac T. Conner, Nashville,Tennessee, for the appellant, Timothy Dismukes.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Victor S. Johnson, III, District Attorney General, and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In March and May of 2003, the Davidson County Grand Jury indicted Petitioner for one count of aggravated assault, two counts of felon in possession of a weapon, one count each of possession of a weapon while under the influence, misdemeanor DUI, and violating the implied consent law stemming from incidents on November 22, 2002. On April 4, 2005, Petitioner entered a guilty plea to one count of aggravated assault and one count of felon in possession of a weapon.

Pursuant to the guilty plea, Petitioner was sentenced to six years and one month for the aggravated assault and four years for felon in possession of a weapon to be served concurrently as a Range II offender.

On March 9, 2006, Petitioner filed a Petition for Post-conviction Relief arguing that he was afforded ineffective assistance of counsel and that he entered his plea involuntarily and unknowingly. The post-conviction court held an evidentiary hearing on December 5, 2007.

Post-Conviction Hearing

Petitioner was the first witness at the hearing. He testified that after his arrest he had retained a lawyer, but trial counsel was appointed to represent him shortly thereafter. Petitioner stated that he did not speak with trial counsel until two or three months after he was appointed and that they did not even discuss the charges at hand for DUI, aggravated assault and possession of a weapon, but instead talked about a pending robbery charge he had. Petitioner stated that he could not recall he and trial counsel ever discussing the aggravated assault charge because their discussions focused on the possession of a weapon charge. Petitioner stated that he wanted to go to trial on the aggravated assault charge because he was not guilty, but he did admit he was guilty of possession of a weapon. Petitioner stated the gun was not his but was in the car with him when he was arrested. Petitioner also testified that trial counsel never wrote him a letter explaining the charges against him. When asked if he understood what plea he was accepting, Petitioner stated, "Yes, I understood – no not really. I understood that I was trying to accept a plea for the gun charge, that was the only thing." Petitioner went on to state that he did not realize he was also accepting a plea to the other charges and could not remember if trial counsel had ever fully explained his plea to him. Trial counsel was also appointed to represent Petitioner on a separate set of charges. After his guilty plea for these charges, Petitioner discharged trial counsel because Petitioner did not feel like he should have been found guilty on the other charges to which he pled guilty.

On cross-examination, the State asked Petitioner if he had reviewed the transcript of the plea colloquy.[1] Petitioner stated that he had seen it but had not read it. Petitioner admitted that he answered all the trial judge's questions truthfully when he entered his plea. Petitioner also admitted that he had entered a guilty plea on more than one occasion. Petitioner admitted that he was particularly concerned about the possession of a weapon charge because he did not want the case to go to the federal courts. He admitted that if trial counsel was able to resolve the charges at hand it would prevent the possession of a weapon charge from going to federal court. He also admitted that the judgment form and transcript from the colloquy include statements that part of the guilty plea settlement was that the possession of a weapon charge would not go to federal court. Petitioner made the following statement, "I wanted a trial on the aggravated assault, but I couldn't have said that and been able to take the time on the gun charge." The following exchange also occurred:

[1] We note that the transcript of the plea colloquy referenced at the post-conviction hearing is not included in the record on appeal.

Q. So, again, you couldn't have one without the other, you had to plead on the assault to keep the gun charge from going federal, right?

A. Yes, sir, I guess you could say that.

Q. All right. And that was a decision that you had to make of whether to accept it or not, correct?

A. Correct.

Q. So at the time, obviously, that was the best you were going to be able to do and you decided to take the deal, correct?

A. Correct.

Trial counsel also testified at the hearing. He stated that he was particularly concerned about Petitioner's possession of a weapon charge because of the stiffer sentences in federal court. He spoke with both the state prosecutor and the U.S. Attorney's office to determine whether there was a possibility the possession of a weapon charge would go to federal court. The U.S. Attorney told trial counsel that if the charge was not resolved at the State level, the possession of a weapon charge would be prosecuted federally. Trial counsel calculated what Petitioner's sentence would be for possession of a weapon in federal court and determined that Petitioner would have received around ten years solely on that charge with no parole. Trial counsel testified that Petitioner was very familiar with the criminal justice system. He had no difficulty communicating with Petitioner and also Petitioner's family. When Petitioner informed trial counsel that he was not the owner of the gun, trial counsel contacted the individual and spoke with the purported owner. The State's attorney did not give Petitioner the option of trying just the aggravated assault charge and settling the possession of a weapon charge. Trial counsel stated that Petitioner had to take the plea with regard to all the charges or have the possession of a weapon charge prosecuted in federal court. Had Petitioner gone to trial on the aggravated assault, he was facing fifteen years as a career offender. Part of Petitioner's plea to the charges at hand was that the possession of a weapon charge would not be taken to the federal court. Trial counsel did not see or hear anything that would lead him to believe that Petitioner did not understand the charges to which he was pleading. Trial counsel said that Petitioner took the sentence for six year and a month so that he could serve his sentence in the TDOC instead of serving at a CCA facility.

On cross-examination, trial counsel stated that he represented Petitioner for more than a year. During the time, trial counsel estimated that he met with Petitioner six to eight times and spoke with Petitioner on the telephone twenty to thirty times. Trial counsel stated that Petitioner told him he felt like he had a good case on the aggravated assault because Petitioner believed that the witnesses would not show up at a trial. Trial counsel testified that he explained all aspects of the case and all

potential liability, both state and federal, to Petitioner. Trial counsel stated that he believed that he had written more than one letter to Petitioner regarding the case, but trial counsel neglected to review his file before coming to the hearing and did not bring the file with him. Trial counsel stated that he went over the plea agreement with Petitioner. Trial counsel stated that he always looks to see if there are any suppression issues in a traffic stop situation, but there were no issues in Petitioner's case. Trial counsel reiterated that Petitioner understood the nature and consequences of his plea.

On December 31, 2007, the post-conviction court filed an order denying and dismissing the petition. The post-conviction court specifically stated that it did not find Petitioner's testimony to be credible.

Petitioner filed a timely notice of appeal.

ANALYSIS

On appeal, Petitioner argues that the post-conviction court erred in denying and dismissing his petition because his plea was not entered voluntarily due to ineffective assistance of counsel because trial counsel failed to adequately investigate the facts of the case and induced Petitioner to plead guilty. The State argues that the post-conviction court did not err.

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Involuntary Guilty Plea

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. *See State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Specifically, a reviewing court must consider:

> [T]he relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

Effective Assistance of Counsel

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id*. at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo" with no presumption of correctness. *Burns*, 6 S.W.3d at 461 (Tenn. 1999).

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *Alford*, 400 U.S. at 31). As stated above, in order to successfully challenge the effectiveness of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *See*

Baxter, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

Trial counsel testified that he spoke with the owner of the gun, as well as the U.S. Attorney in his investigation of the possession of a weapon charge. It is clear from both trial counsel's testimony and Petitioner's testimony that Petitioner's biggest concern was whether the possession of a weapon charge would be prosecuted federally. Petitioner's only option to avoid federal prosecution was the plea offered by the State to resolve both the aggravated assault and possession of a weapon charge at one time. Petitioner has not shown that trial counsel's representation was less than competent. In addition, even if trial counsel had been ineffective, Petitioner cannot show that he would not have pled guilty. Petitioner testified that his best option to avoid federal prosecution was to plead guilty to the aggravated assault charge and the possession of a weapon charge. After a thorough review of the record, we find ample evidence to support the post-conviction court's denial of the petition. Therefore, this issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the decision of the post-conviction court.

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JERRY L. SMITH, JUDGE